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SUPREME COURT OF THE UNITED STATES

ROBERT LEE BROADNEX
PETITIONER

VERSUS

STATE OF CALIFORNIA
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Questions presented

I. Whether factually innocent petitioner was denied a fair trial because the sole eyewitness to the shooting lied and petitioner's conviction for second-degree murder rested on the testimony of three eyewitnesses, only one of whom testified to seeing the actually shooting. She later recanted, saying that she relied on the statement to her of another witness describing the shooting, but that she had not seen the shooting. Her recantation casts doubt on all the evidence in the case. The other witnesses did not see the shooting.

II. Whether factually innocent Petitioner is entitled to relief where the police or a prosecution witness dissuaded the supposed eyewitness from recanting during the trial where there is no question that one of the state's key witnesses told the "eyewitness" to stick to her story. She claims also that police and the witness threatened her if she changed her story, although the story was not true.

III. Whether it is sufficient to require reversal of the conviction even if petitioner cannot show that the state knew the testimony was false; although the record is clear that the eyewitness recanted and that she told multiple stories to the police, Petitioner cannot now show that the police knew the testimony was false at the time Petitioner was tried. Petitioner suggests that reversal and remand are required pursuant to *Napue v. Illinois* 360 U.S. 264 (1959) and *Alcorta v. Texas* 355 U.S. 28.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Amendment VI

United States Constitution Amendment XIV

California Penal Code section 1473

(a) Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration; or (2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to subdivision (b).

(d) Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

JURISIDICTION

This Court has Jurisdiction because Petitioner seeks review of a final judgment of the Supreme Court of the State of California denying his Petition for a Writ of Habeas Corpus. That Court denied the Petition on March 22, 2006. (Order denying Petition for Writ of Habeas Corpus, attached).

This Court also has Jurisdiction because Petitioner fully exhausted his claim for relief in the State courts, said claim being that his state criminal conviction was the result of the knowing use of and subornation of perjured testimony, contrary to long established precedent of this Court, *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed.2d 791 (1935) and of the right to due process as guaranteed by the XIVth amendment.

Justice Kennedy granted Petitioner's request for Exhibits to State Petition tension of time to file the within Petition until July 20, 2006.

JUDGMENT SOUGHT TO BE REVIEWED

Petitioner seeks review of the denial of his Petition for Writ of Habeas Corpus by the California Supreme Court. The Appendix contains the California Supreme Court order and the orders and opinions of the Court of Appeal and the Superior Court, as well as the transcripts of the evidentiary hearing held in this matter and exhibits presented to the California Supreme Court.

STATEMENT OF FACTS

Petitioner was convicted in 1993 of second-degree murder for shooting Jaime Plasencia, a/k/a Roberto. The Court of Appeal affirmed his

conviction. He filed a state habeas on September 2003.

The Superior Court held an evidentiary hearing held 7/16/04 and the Habeas petition was denied 11/10/04 but Petitioner was not notified until 12/02/04. Petitioner filed a habeas petition in the state court of appeal, which was denied 11/22/05. His habeas corpus petition to the California Supreme Court was denied 3/22/06.

Facts: Petitioner was convicted of murder based upon the eyewitness testimony of Daphne Cade who described in detail that she had seen him raise a gun to the victim's head, although his arms were in casts or white bandages, and she then heard the shot, having turned her head away at that point. She later recanted, saying that the police and Debra Johnson told her what to say and that she was not present at the shooting. Instead Debra told her details and her testimony was informed by her belief, based upon what Debra told her, that Petitioner was guilty. Her false testimony at trial is the basis for the habeas petition. After the evidentiary hearing the trial judge said that he did not believe her testimony at the evidentiary hearing but instead her original testimony.

The Superior Court held an evidentiary hearing at which Petitioner showed that :

"Eyewitness" Cade lied at trial when she said she saw the murder. (Exhibits page 61) Instead, she admitted that she did not see it, but another witness, Debra Johnson, (Exhibits pages 34,46,63) and the police had told her what to say (Exhibits pages 48,64.) She had told the police she had seen the shooting because Debra Johnson had described it to her. (Exhibits page 34-35). Although she wanted to change her story at the trial and retrial, Debra Johnson had told her to stick to her story.

She found out only after the trial that Johnson had not in fact see the shooting. (Exhibits page 81)

That Johnson told Cade to stick to her story was corroborated both by Johnson herself and by a juror in the first trial who had heard the exchange.

At the evidentiary hearing Cade and her boyfriend Keith Morisette said that Cade was with Morisette and had not seen the shooting. (Exhibits page 98.)

Order on State Habeas

Although Petitioner unsuccessfully petitioned the State Court of Appeal and Supreme Court, the Superior Court was the only one to issue a detailed order. (Exhibit B, exhibits pages 3-9.) The Superior Court judge reviewed Petitioner's contentions and the testimony of Cade, Keith Morisette, and Miriam Broadnex, Petitioner's mother. He did not find Cade or Morisette credible (but said nothing about Miriam Broadnex.) He therefore denied the petition.

DISCUSSION

THIS COURT SHOULD GRANT CERTIORARI BECAUSE AN INNOCENT MAN SITS IN PRISON HAVING BEEN CONVICTED ON FALSE TESTIMONY THAT WAS TO SOME EXTENT PROMULGATED BY THE PROSECUTION

I. This Court is not bound by the Superior Court's determination of the facts, and instead independently reviews the evidence, here to assess whether Petitioner has demonstrated a sufficient probability that the testimony against him was false.

This case concerns a conviction based upon false evidence that was material, probative, and suborned by the police or known to be false. If it

does not appear clear that the police induced the false testimony or knew it was false, is police/DA knowledge required if the conviction resulted from false testimony? Petitioner urges this court to grant certiorari and then to find that any conviction based upon false testimony should be reversed.

Defendant maintains his innocence. He offered corroborated alibi evidence at trial: that he was at his mother's house, that she locks her house at night and defendant could not have gone out at 3'oclock in the morning because he had no key, and that it was unlikely if not impossible for him to have used a firearm because his arms were in casts because he had been shot in both hands. His conviction clearly resulted only from the dramatic "eyewitness" testimony that has now been recanted.

STANDARD OF REVIEW

This Court makes its own independent examination of the record where a federal constitutional violation is alleged. (*Martin v. Hunter's Lessee*, 14 U.S. 302, 315-16 (1816).

PETITIONER'S CONVICTION ON FALSE EVIDENCE OFFENDS THE CONSTITUTION.

The conviction of an innocent person based upon false testimony offends the Constitution.

Hicks v. Oklahoma (447 U.S. 343 [100 S.Ct. 2227, 65 L. Ed 2d. 175] 1980)

Mooney v. Holohan 294 U.S. 103, 55 S.CT. 340, 79 L.Ed. 791] (1935).

Defendant has a federal constitutional right not to be convicted on the state's knowing use of false testimony. (*Mooney v. Holohan*, 294 U.S. 103, 112-113). Under the XIVth Amendment the deliberate deception violates due process. Petitioner

bears the burden of proof by preponderance of the evidence.

Petitioner suggests, and requests this Court to find, that any conviction based upon false testimony violates the Constitution and must be reversed, whether or not the state knew the evidence was false.

Further, he requests that this Court's independently review the evidence and find that he his conviction was unconstitutional because it was based upon false evidence.

. THE RECORD SHOWS THAT PETITIONER WAS CONVICTED ON FALSE TESTIMONY

At the preliminary hearing and at both trials Cade gave detailed descriptions of the shooting. Her testimony at the second trial is included in the exhibits to this Petition (Exhibit E.) In brief, she said that she observed Petitioner with a gun to the victim's left temple but that she looked away before she heard the shot. (This is the testimony that she recants at the Superior Court evidentiary hearing on the habeas petition, Exhibit D to this Petition.) The state court Petition was based upon new evidence: that Cade lied about seeing the shooting and that she did so because she falsely believed that Debra Johnson had seen the shooting but could not say so to the police. Cade also said that she testified as she did because Johnson and the police told her what to say.

The record supports Petitioner's contention that Cade's only true testimony is her recantation.

1) When she talked to the police she did not tell them Michael Good and Dempsey were present. (Exhibit E, trial transcript page 157)

2) She initially chose not to talk to the police. (Exhibit E page 159)

3) Her testimony at the preliminary hearing was false about where she was standing during the shooting. (Exhibit E at page 172-173.)

4) Although she testified at the second trial that she was under a tree and that she went over her testimony and made a diagram of the scene with one of the district attorney., there is no tree in the diagram presented to the jury. (Exhibit E at page 180).

5) There is no tree in her statement to the police. (Exhibit E at page 181).

6) Her statement to the police about where she was during the shooting was false. (Exhibit E at page 183.)

7) Her previous testimony about where she was during the shooting was false. (Exhibit E at Page 189.)

8) Her previous testimony about whether she paid rent to Johnson was false. (Exhibit E at page 190).

9) She lied to the police about who else was in the driveway at the time she claimed to have seen the shooting. (Exhibit E at page 191.)

10) Her testimony at trial contradicts her earlier statements about what she heard the person she identified as Petitioner and the victim say to each other before the shooting. (Exhibit E at page 192-194.)

11) She claimed that her testimony at the preliminary hearing about whether the shooter had the gun out when Michael and Debra were outside was an error. (Exhibit E at page 196).

12) She contradicted herself at trial about whether Petitioner could use his fingers or hands. (See e.g. Exhibit E at pages 211-213) and which direction she ran after the shooting. (Id and pages 220-225.)

At the evidentiary hearing on the habeas petition (Exhibit B to this Petition) Cade said that:

1. She had lied at the trial. (Exhibit D, exhibits page 33)

2. The police and Debra Johnson told her what to say. (Exhibits page 34)

3. Debra Johnson told her that Debra had seen the shooting but Cade should tell the police that Cade had seen it. (Id.)

4. When she testified at the trials and preliminary hearing she did not know that Petitioner had casts (as opposed to bandages) on his hands. (Exhibits page 34.)

5. Cade told the police she had not seen the shooting. (Exhibits at page 34.)

6. There was drug dealing at the Johnson house. (Exhibits page 141 .)

7. Cade never saw anyone kill the victim. However, she and Keith heard the gunshot, but did not go to the scene of the crime(Exhibits at pages 46, 106.)

8. Johnson told her what to say to the police and the police told her that if she did not say that "Fella" did it, they would put her in jail. They also said that they would get a warrant for murder, and for not coming in with a statement, against her boyfriend. Keith Morisette.(Exhibits page 34-64.)

At the evidentiary hearing Cade said that she believed Debra Johnson when Johnson told her that Johnson had seen the shooting. (Exhibits page 60.) She also believed the police. (Exhibits page 64.) She talked to the police and testified against Broadnex because she felt that it was just wrong for Broadnex to shoot Roberto.

At the time she testified she did not know that Johnson had not seen the shooting. (Exhibits at page 60.)

Miriam Broadnex, Petitioner's wife corroborates Cade's story about the meeting that led to her confession to lying at trial. (Exhibit B at page 61.) After Mrs. Broadnex found out about Cade's retraction she needed between six months to a year to raise money for a lawyer. (Exhibit B at page 62 47.)

Keith Morisette corroborated Cade's testimony.

He says that he was in his garage watching TV when he heard the shot; he went outside being nosy and walked around the neighborhood. Debra told the police where to find him and Cade---Police found him at his grandmother's house. (Exhibits at page 100.)

Keith Morisette was initially arrested for this murder. (Id.) He knew what the police and Debra Johnson had told Cade to say and his home is across the street from the Johnson house. (Exhibit Page 107.) Morisette did not see the body when he came out after hearing the shot. (Id.) Daphne told him immediately that she had lied at trial and that she was scared that Debra and the police had threatened her. (Exhibits page 108.)

Johnson was angry with Petitioner because she thought he was selling drugs in her territory. (Exhibits page 138.)

There is no factual dispute that Johnson told Cade what to day at the trials. A juror in the first trial, which was deadlocked, heard Johnson tell Cade and Good "whatever you do make sure you stick to your story". Johnson and Cade testified that Johnson told Cade to stick to her story but also that this followed Cade saying that she felt she was lying.

There is no factual dispute about Petitioner's casts: Petitioner's arms were in casts or bandages

(he says casts) but he could brush his hair and dial a phone. (Opinion of Court of Appeal, direct appeal, page 6, Exhibit A to State Petition). The record does not show whether he could hold a gun and pull the trigger.

ARGUMENT

PETITIONER IS ENTITILED TO RELIEF WHETHER OR NOT THE STATE KNEW THE EVIDENCE WAS FALSE.

The central issue in this case is:

Does the Constitution prohibit only the state's knowing use of false testimony such that the police or prosecution must know that the evidence is false, or is it sufficient that the conviction rest on false testimony because the prosecution has an obligation to correct the falsehood whenever it learns of it? Under California law Petitioner was entitled to habeas relief because false evidence that was substantially probative on the issue of guilt was introduced at trial. (California Penal Code section 1473.) California does not require that the prosecution know the evidence is false when it is introduced. (California Penal Code section 1473 subd. d.)

In *Napue v. Illinois* 360 U.S. 264 (1959), the witness testified falsely that he had received no promise or consideration for his testimony when instead he had been promised sentencing consideration. This Court held that the conviction must fall because the prosecution, which had made the promise, knew the statement would be false but elicited the testimony any way.

The result would be the same where the state, even though it did not solicit the false testimony, allowed it to go uncorrected: see *Alcorta Texas* 355 U.S. 28

Petitioner submits that "A Lie is a Lie" and therefore, his conviction should be vacated even if the prosecution had no part in procuring the false statement.

THIS COURT'S PREVIOUS DECISIONS THAT PROTECT A DEFENDANT FROM CONVICTION BY FALSE EVIDENCE SUPPORT PETITIONER

Petitioner's case is similar factually to *Alcorta v. Texas*, where the prosecution did not necessarily direct the false testimony, but encouraged the main witness not to volunteer the truth. Castilleja, who had been having an affair with the accused's wife and had discussed the affair with the prosecution. The state's attorney told him *he should not volunteer any information about such intercourse* but if specifically asked about it to answer truthfully. This Court reversed the decision of the Texas Supreme Court denying Alcorta's petition for a writ of habeas corpus.

Basing its decision on the general principles laid down by this Court *in Mooney v . Holohan* and Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed.2d 214, this Court held that Alcorta was denied due process of law

> It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. The prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife elicited this testimony. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of

'sudden passion' in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to 'murder without malice' precluding the death penalty now imposed upon him. (Id at pp 30-32.)

PETITIONER'S CONVICTION OFFENDS DUE PROCESS WHETHER OR NOT THE STATE KNEW THAT CADE WAS LYING

In Petitioner's case it is clear that if the prosecution knew that Cade was testifying falsely that due process would have been violated (See, e.g., *Banks v. Dretke* 540 U.S. 668 (2004) where the prosecution's failure to disclose the false testimony was a Brady violation as well.) If the prosecution procured the false testimony, again, there would be a clear violation. A state conviction obtained by the knowing use of perjured testimony is unconstitutional. *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 341-42, 79 L.Ed. 791 (1935). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois,* 360 U.S. 264, 269-70, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) (citations omitted). This rule applies even though the false testimony only goes to the credibility of the witness. Id. A conviction must be reversed if "there is any reasonable

likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted).
Furthermore, a defendant's due process rights can be violated when a prosecutor was not, but should have been, aware that her or his witness was lying. *See Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (prosecutor responsible to know of promise of immunity given to a witness by another prosecutor in the same office).
Moreover, under California law the prosecution does not need to know that the testimony is false.

The Second Circuit held, even absent a showing of prosecutorial misconduct, a conviction obtained in part by perjured testimony may violate due process. *Sanders v. Sullivan,* 863 F.2d 218, 224 (2d Cir.1988) (holding that conviction based on testimony later recanted may be of extraordinary nature to find due process violation and remanding for hearing as to credibility of recantation). The state violates a criminal defendant's right to due process of law when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears. *See Alcorta v. Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Pyle v. Kansas,* 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). (See also, *Hayes v. Brown* 399 F.3d 972 (9th Cir. 2005).
In Petitioner's case, although there were many indications that she was untruthful, the lying witness only admitted her perjury ten years after the conviction—that she not only had not seen the shooting, but the entire story had been fabricated by Johnson and the police. (Declaration and testimony of Daphne Cade, Exhibits E.)

Here, after ten years, the key witness, who had testified falsely that she had seen the murder,

claimed that she had so testified believing what she had been told by her landlady, Debra Johnson,—that the landlady had seen Petitioner commit the murder. The witness, Daphne Cade, then learned that Johnson had not seen the shooting. After a chance encounter ten years later with Petitioner's sister, Cade finally unburdened herself of her lie. So it is unlikely that the prosecution could have known at the time of trial that Cade's testimony was doubly false.

Thus, this case presents the question of whether a conviction must be reversed and the case remanded for a new trial where the key prosecution witness comes forward after the trial is over with testimony that eviscerates the prosecution's case, but the defendant cannot show that the prosecution knew or should have known that the evidence was false.

Petitioner maintains that based upon this court's historic jurisprudence, notwithstanding the high threshold for proving innocence post-conviction set in *Herrera* that the answer must be yes. That being the case, Petitioner maintains that the state courts unconstitutionally applied the state habeas statute in violation of this court's jurisprudence. Moreover, the facts support the conclusion that the prosecution should have known that Cade's trial testimony was false because of her many contradictions.

PRAYER FOR RELIEF

Petitioner, therefore, prays that this court will grant certiorari, review the record, and reverse his conviction.

Respectfully submitted,

July 5, 2006

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